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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL PARDO AVINA et al.,

Defendants and Appellants.

D058375

(Super. Ct. No. INF054992)

APPEALS from judgments of the Superior Court of Riverside County, Randall D. White, Judge. The judgment against Raul Pardo Avina is affirmed as modified. The judgment against George Gomez, Jr., is affirmed.

Raul Pardo Avina and George Gomez, Jr., who were jointly charged in a 35-count amended information and jointly tried before a jury, were convicted of numerous offenses committed in late April through late June of 2006, including many robberies, in

Riverside County.<sup>1</sup> The court sentenced Avina to an aggregate prison term of 91 years and Gomez to an aggregate term of 58 years four months.

Gomez and Avina separately appeal. Gomez contends there is insufficient evidence to support his convictions of counts 8 (attempted robbery of Dean Goetz), 17 (robbery of Jesus Sustaita Hernandez), and 22 (robbery of Salvador Pimentel Valencia).

Avina contends (1) the evidence is insufficient to support his count 22 robbery conviction; (2) the execution of the sentence imposed for his count 24 grand theft conviction should have been stayed under Penal Code section 654 (undesignated statutory references will be to the Penal Code) because the count 23 robbery offense and the count 24 grand theft offense arose from an indivisible course of conduct with a single objective; (3) the execution of the sentence imposed for his count 30 grand theft conviction should have been stayed under section 654 because the count 29 burglary offense and the count 30 grand theft offense were based upon the same act of taking a gold chain from Don Roberto's Jewelers; and (4) the execution of the sentence imposed for his count 27 conviction of unlawful possession of a firearm by a felon also should have been stayed under section 654.

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<sup>1</sup> Due to the complexity of the procedural history of this case and the large number of criminal counts and related sentencing enhancement allegations, most of which are not relevant to the issues Avina and Gomez raise on appeal, we shall dispense with a detailed introductory summary of these aspects of the case and discuss these matters as needed in our analysis of their claims.

The Attorney General agrees the execution of the sentences imposed for Avina's count 24 grand theft and count 30 grand theft convictions should have been stayed under section 654.

We conclude the judgment against Avina must be modified because the court should have stayed under section 654 the sentences it imposed for Avina's count 24 grand theft and count 30 grand theft convictions. As modified, the judgment is affirmed. The judgment against Gomez is affirmed.

## FACTUAL BACKGROUND

### *A. Counts at Issue in These Appeals<sup>2</sup>*

#### *Count 8 (victim: Dean Goetz)*

Dean Goetz testified that in the afternoon on May 27, 2006 (all further dates will refer to calendar year 2006), a grayish American midsize car stopped a few feet away from him as he was gardening in his front yard in Palm Springs. Goetz described the driver to the police as "stocky." The Hispanic passenger, whom Goetz identified at trial as Avina, got out of the car, rushed up to Goetz pointing a handgun at him, and demanded money. When Goetz told Avina he had no money on him, Avina patted him down, but found nothing and left in the same car after searching Goetz's garage.

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<sup>2</sup> We shall discuss counts 8, 17, 22, 24 and 30 in greater detail in the discussion section of this opinion.

*Count 17 (victim: Jesus Sustaita Hernandez)*

Jesus Sustaita Hernandez (Sustaita) testified that in the morning on June 13, he was standing next to his truck in front of his house in Coachella when a gray or blue Ford Taurus stopped nearby and a Hispanic man, whom he identified at trial as Avina, got out of the passenger's side of the Taurus, walked towards him pointing a handgun, told Sustaita not to look at him, took Sustaita's wallet, got back into the Taurus, and drove away.

*Count 22 (victim: Salvador Pimentel Valencia)*

Salvador Pimentel Valencia (Pimentel) was robbed outside his home in Mecca in the morning on June 19 after two men in a green Ford Taurus stopped nearby. A Hispanic man got out of the passenger's side of the Taurus, pulled out a black semiautomatic handgun, and took Pimentel's wallet. The man got back in the car and it drove away.

*Counts 23 and 24 (victims: Ana Ramirez and Prizma Jewelers, respectively)<sup>3</sup>*

Stella Flores, who worked at Prizma Jewelers in Coachella, testified that Avina entered the store on April 26 and told a salesperson he wanted to buy a gift for his girlfriend. He chose a set of gold bracelets and said he was going to pay with a credit card. Avina reached over the counter, grabbed the box containing the bracelets, and walked out of the store. When Ana Ramirez, a store employee, grabbed Avina's shirt and told him to return the bracelets, Avina pushed her and ran away.

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<sup>3</sup> The court granted Gomez's section 1118 motion to dismiss both counts as to him.

*Counts 29 and 30 (victim: Don Roberto's Jewelers)*<sup>4</sup>

Jomayra Pinon, a salesperson at Don Roberto's Jewelers in Coachella, testified that on April 23, Avina entered the store and chose a gold chain. As Pinon was holding the box containing the chain, Avina pulled the box out of her hand and walked out the door.

*B. Other Counts*

*Count 1 (victim: Alfonso Reyes)*

Alfonso Reyes testified that on May 19 at around 1:00 a.m., he, his wife, and his wife's mother stopped to buy water from a vending machine at a Food 4 Less store on Highway 111 in Coachella. As he was walking to the vending machine, a light-gray Ford Taurus pulled into the parking lot and parked with its lights on in front of Reyes's truck. Reyes looked at the Hispanic driver of the Taurus, who was "more stout" than the Hispanic passenger. Reyes identified Gomez at trial as the driver. Avina, whom Reyes also identified at trial, exited from the passenger's side of the Taurus, walked up to Reyes as Reyes was walking back to his truck, pointed a dark black .45-caliber semiautomatic handgun at him, and said, "Give me your wallet." Reyes threw his wallet—which contained his identification cards, driver's license, credit cards, and about \$450 in cash—at Avina. Avina picked up the wallet and got in the Taurus, which drove away. Reyes looked at the license plate, which read "Gomezz."

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<sup>4</sup> We shall discuss counts 29 and 30 in greater detail in the discussion section of this opinion.

*Counts 2 and 3 (victims: Noe Vigil and Hilda Vigil, respectively)*

Noe Vigil and his wife, Hilda Vigil, who own a pool maintenance and repair business, testified that on May 23, at around 2:00 or 2:30 p.m., they were cleaning a pool at a home in Palm Springs. Noe Vigil testified that a short-haired Hispanic man, who was around 30 years of age, approached him and asked whether the homeowners needed a gardener. As they were talking, a second Hispanic man with short hair approached and pointed a dark semiautomatic handgun at them. The armed man racked the gun with a sliding motion while the other searched Noe Vigil's pockets and took his wallet—which contained \$400 in cash, a debit card, and some checks—and his cell phone. Noe Vigil asked the man to return his driver's license, but he refused, struck Noe Vigil on the back, and pushed him into the pool. The two men told him and his wife not to move and then walked away.

*Count 4 (victim: Vianca Callin)*

Vianca Callin testified that on May 26, at around 8:30 a.m., she was standing outside her car in the parking lot of a medical building in Coachella, getting her young children, who were inside the car, ready for a doctor's appointment. She heard a man ask for her purse. Callin turned around and saw a tall Hispanic man with very short hair, weighing about 200 pounds, pointing a black handgun at her face. He angrily said in English, "Give me your purse, you bitch, before I kill you." Callin's children heard this and started to cry. Fearing he might kill her, Callin gave the man her diaper bag. Inside the diaper bag was her wallet, which contained a debit card, her driver's license, and the keys to her vehicle. The man then got into a car, which drove away.

*Counts 6 and 7 (victims: Roberto Hidalgo and Carlos DeLeon, respectively)*

Carlos DeLeon testified that on May 27, between 5:30 and 6:00 p.m., he and his then-82-year-old brother, Roberto Hidalgo, were outside DeLeon's home in Rancho Mirage, loading items into Hidalgo's truck. Two Hispanic men with shaved heads in a four-door sedan stopped in the middle of the street and got out of the car. At trial, DeLeon identified Avina and Gomez as those two men. Avina, the passenger who got out of the sedan, removed a black semiautomatic handgun out of his waistband and pointed it at DeLeon. Both Avina and Gomez pushed DeLeon, telling him to get against the truck, but DeLeon ran away, yelling and calling for help. Avina and Gomez did not take DeLeon's wallet because he was able to run away. When DeLeon returned home, Hidalgo was shaking and appeared very scared.

*Count 9 (victim: Robert Solomon)*

Robert Solomon testified that on May 29, at around 8:07 p.m. when it was still light outside, he was working at the workbench in his garage in Palm Desert with the garage door open and the lights on. In his pocket he had his wallet, which contained about \$120, car keys, and some loose change. A greenish-gray Ford Taurus pulled up and two Hispanic men, whom Solomon identified at trial as Avina and Gomez, walked up the driveway and into the garage. Avina cocked his semiautomatic handgun and pointed it at Solomon as Gomez said in English, "Give me your wallet," then reached into Solomon's pocket, and took his wallet. Solomon testified he let Gomez take his wallet because Avina had a gun.

*Count 10 (victim: John Phelps)*

John Phelps, testified that on May 30, at around 10:00 a.m., he was standing by the hood of his truck in front of his condominium in Palm Springs. A Hispanic man about five feet nine inches tall with a shaved head, whom Phelps identified at trial as Gomez, walked up to Phelps, pointed a .45-caliber semiautomatic handgun at him, and said in English, "Give me your wallet." Phelps told Gomez his wallet was in the truck. Gomez commanded Phelps to get it, and Phelps complied and gave the wallet to him because he was concerned Gomez would shoot him if he did not give it to him. The wallet contained several credit and identification cards and insurance papers for the truck. After he took the wallet, Gomez ordered Phelps to turn around and not look back. Gomez got into a green car and drove away.

*Counts 11 and 12 (victims: Pedro Ortega and Jorge Ortega, respectively)*

Pedro Ortega and Jorge Ortega, who are brothers, testified that on June 1, at around 4:00 or 5:00 p.m., they were waiting for a ride home after working in a field near Thermal. Two Hispanic men in a green or greenish gray Ford Taurus drove up to them in the field on a dirt road after making a U-turn. At trial, the Ortegases identified Gomez as the driver; Jorge Ortega identified Avina as the passenger. Gomez got out of the car, introduced himself as "Miguel," and asked Pedro Ortega whether there was work for him. Avina then exited the Taurus, and Gomez grabbed Pedro Ortega's hand and told him in Spanish, "You're being robbed." Avina pulled out a dark semiautomatic handgun from his waistband, cocked it, pointed it at the Ortegases, and told them. "Don't move or I'll shoot you." Gomez patted down Pedro Ortega and took his wallet from the back pocket



of his pants. Gomez also patted down Jorge Ortega but found nothing. Avina told the Ortegas he knew where they lived, and he would kill them if they did anything. Gomez and Avina then returned to their car and drove away.

*Count 13 (victim: Isidoro Castellon)*

Isidoro Castellon testified that on June 7, at around 7:00 p.m., he walked out of a laundromat in Coachella and went to his truck, opened the driver's side door, and started looking at some bills he had to pay. Two men in a white or grayish Ford Taurus pulled into the parking lot and parked. The passenger, a Hispanic man carrying a .45-caliber semiautomatic handgun, got out of the car and walked towards Castellon. The man cocked the gun with a sliding motion, placed it against Castellon's neck, and said, "I'm robbing you. Turn around, face the truck. Put your hands on the roof of the truck and don't turn around" He then said, "Give me your wallet." He put his hand in Castellon's back pocket and took his wallet, which contained about \$300, Castellon's green card, his Social Security card, and a bank card. The man told Castellon, "Don't turn around," got into the passenger's side of the car, and the car drove away.

*Counts 14, 15, and 16 (victims: Roberto Rodriguez, Jose Morales Guerrero, and Ernesto Lazos, respectively)*

On June 9, between 5:45 and 6:15 p.m., Roberto Rodriguez, Jose Morales Guerrero (Morales), and Ernesto Lazos were outside an apartment complex in Coachella working on Lazos's truck, when a grayish Ford car pulled into the complex parking lot and stopped next to them. Morales identified Gomez and Avina as the men who arrived in the car. Gomez and Avina got out of the car and approached the three men. Gomez

was holding a dark semiautomatic handgun, and Avina was holding a knife. Gomez pointed the gun at Morales, cocked it, told Morales not to look at his face, and demanded his wallet. Morales gave Gomez his wallet, which contained about \$50 in cash, his Social Security card, and two credit cards. Gomez then pointed the gun at Rodriguez and demanded his wallet. Rodriguez gave his wallet to Gomez.

Avina pointed the knife at Lazos, who was then 65 years old, and said, "Old man, old man, give me your wallet." Lazos gave Avina his wallet, which contained about \$1,000 in cash, his driver's license, and car insurance information.

After taking the wallets, Gomez and Avina ordered Rodriguez, Morales, and Lazos to get down on their knees and told them they would be shot if they looked at them. Avina and Gomez returned to the car and drove away.

*Count 18 (victim: Gustavo Lopez Ceja)*

Gustavo Lopez Ceja testified that one morning in June, between 7:30 and 8:00 a.m., he was still in his truck in a parking lot after driving alone to a park in Coachella when two "Chicano" men in a blue Taurus drove up and parked next to his truck on the driver's side. The passenger got out of the Taurus and asked Ceja whether he knew anyone who sold drugs. When Ceja responded, "No," the man pulled out a .45-caliber semiautomatic handgun from his waistband, cocked it with a sliding motion, pointed it at Ceja's head through the open window of Ceja's truck, and told Ceja to give him his wallet or he would kill him. At trial, Ceja testified that Avina resembled the man with the gun. Ceja said he would give his wallet to Avina and asked that the papers be returned to him. Avina said he would leave the wallet and papers at a location "further up." Avina also

demanded the keys to Ceja's truck and said he would throw them out further up, too. The driver of the Taurus told Ceja, "Give it to him, home boy. Otherwise, he's going to kill you." Ceja testified that Avina resembled the driver of the Taurus. Ceja gave his wallet and keys to Avina. Ceja's wallet contained about \$300 in cash, family pictures, his green card, his Social Security card, and his driver's license. Avina told Ceja to get down and not get up or he would shoot him. Ceja found his keys, but not his wallet, in a nearby grassy area after Avina and Gomez drove away.

*Counts 19 and 20 (victims: Mary O'Brien and Terrence O'Brien, respectively)*

On June 16, at around 9:00 p.m., Mary O'Brien and her husband, Terrence O'Brien, returned to their home in Thermal after doing some shopping. As Terrence was backing the car into the garage as Mary stood outside, a green Ford Taurus drove slowly by, made a U-turn, drove slowly down the street in front of the house and turned right. Two Hispanic men ran across the O'Briens' front yard. One had a handgun, and the other a knife. The man with the gun cocked it with a sliding motion and said, "Give us your cash and credit cards." Terrence gave his wallet and car keys to the man with the knife. Mary gave her wallet to one of the men. The men took the cash and credit cards and returned the empty wallets to the O'Briens, and then ran away.

*Count 21 (victim: Erasmo Felix Machado)*

Erasmo Felix Machado and his wife (then-girlfriend), Rubi Felix Machado, testified that on June 18, at around 4:00 a.m., they and their friend Josephina Leon were at a street corner in Coachella saying their good-byes after a party. Rubi and Leon Machado were inside Rubi's Machado's car, and Erasmo Machado was standing next to

the driver's side, when a small white or gray four-door car drove up and stopped in the middle of the street behind him. Rubi Machado testified that two Hispanic men—one taller than the other—got out of the car. The taller man had a gun and the shorter one had a knife. Erasmo Machado testified that the man with the knife was shorter than the man with the gun. The two men approached Erasmo Machado from behind, told him not to turn around, and the taller man put the gun to his head while the man with the knife pointed it at his right side. The man with the gun said, "Give me your wallet." Erasmo Machado gave him the wallet, which contained about \$300 in cash, bank cards, an identification card, and a credit card. The men got back in their car and drove away. Erasmo Machado testified it appeared someone else might be driving because the two men got back in on the passenger's side of the car.

*Count 28 (victim: Cesar Martinez)*

Cesar Martinez testified that in May he was doing landscaping work with Alberto Mendoza at a residence in Cathedral City when a green four-door Nissan stopped in the middle of the street. The driver, whom Martinez identified at trial as Gomez, got out of the car and asked Martinez and Mendoza whether they had any work for him. The passenger got out of the car, pointed a semiautomatic handgun at Martinez and Mendoza, and told them not to do anything. Gomez searched Martinez's pockets but was unable to find his wallet, which was in Martinez's shirt pocket that was covered by the strap to his leaf blower. Gomez and the other man got back into their car and left.

*Counts 32 and 33 (victims: Jose Mejia and Ramiro Gonzalez, respectively)*

Ramiro Gonzalez testified that on June 18, at around 4:18 a.m., he and his cousin Jose Mejia were sitting outside Gonzalez's home in Coachella, drinking beer. A car with two Hispanic men drove by, made a U-turn, came back, and stopped in the middle of the street. The driver, through the open driver's side window, asked Gonzalez for directions. Both men then got out of the car. The driver, who approached Gonzalez and Mejia, had a knife; and the passenger, who stayed by the street, had a semiautomatic handgun, which he cocked. The man with the gun was taller than both Gonzalez, who is five feet eight inches tall, and the man with the knife, who was "a little stocky." As the passenger pointed his gun at Gonzalez and Mejia, the driver pointed his knife at them and asked for their wallets. Neither had a wallet, so Mejia gave the driver his keys, and they both gave the driver some cigarettes. The men told Gonzalez and Mejia to look down and then left in their car.

*Count 34 (victim: Jesus Zepeda)*

Jesus Zepeda testified that on June 15, at around 5:00 a.m., he was sitting in his pickup in the carport where he lived in Coachella, heating up the engine with the driver's side door open, when a Hispanic man, whom Zepeda identified at trial as Gomez, approached him, pointed a knife at his side, and ordered him to open the passenger's side door. Another man, whom Zepeda identified at trial as Avina, was standing outside the passenger's side door, holding a black semiautomatic handgun, which he cocked with a sliding motion after Zepeda opened the door. Gomez asked Zepeda to give him his wallet, which contained about \$150, his driver's license, his resident card, and his

employment authorization card. When Zepeda removed his wallet, Gomez grabbed it from Zepeda's hand. Avina reached into the pickup and took a wallet that belonged to Zepeda's brother. Gomez took Zepeda's keys to the pickup and threw them onto the roof of the carport. Gomez and Avina then got into a gray four-door Nissan Altima—one in the driver's side and one in the passenger's side—and drove away.

*Count 35 (victim: Edward Allen Hoyt)*

Marissa Navarro testified that on June 14, at around 7:00 a.m., her uncle Edward Allen Hoyt and his family, who were visiting Navarro and her parents at their home in La Quinta, were packing up their rental car and preparing to leave when two Hispanic men with shaved heads in a green four-door car, which Navarro saw through the downstairs window, drove up and parked in front of the rental car. The passenger got out of the green car, took Hoyt's set of golf clubs from the rental car, and put them in the green car. The green car then drove away.

*C. Arrest and Investigation*

Denise Porras, who was then a corporal employed by the Riverside County Sheriff's Department, testified she was on patrol duty in Coachella on June 20 at around 12:30 p.m. when she saw a light green Ford Taurus that matched the description given by many of the robbery victims. Corporal Porras testified the Taurus is the car depicted in court's Exhibit No. 19. Corporal Porras made a traffic stop based on a Vehicle Code violation. The Taurus was being driven by Gomez, whom Corporal Porras identified at trial, and no one else was in the car. She contacted Gomez when he pulled the Taurus

into the parking lot of an apartment complex. Corporal Porras learned the car was registered to Gomez's mother, Elsie Gomez, with whom Gomez lived on Morgan Street.

Corporal Porras searched the Taurus and saw the barrel of a semiautomatic handgun underneath the passenger's seat. The gun, which is depicted in court Exhibit No. 17, was an inoperable .45-caliber semiautomatic handgun. Corporal Porras arrested Gomez and called for backup. A further search of the Taurus resulted in the discovery of a folding knife with a serrated blade in the side pocket of the driver's side door and two empty white jewelry boxes used for necklaces. Hoyt's set of golf clubs was found in the trunk.

Corporal Porras assisted in executing a search warrant at Gomez's residence on Morgan Street. Avina was at the house when Corporal Porras and other officers arrived there. Avina was placed under arrest. Officers learned that Gomez and Avina shared a bedroom. On the top shelf of a closet that Gomez and Avina shared, officers found a California license plate that had the name "Gomezzz" on it. In a bucket on the same shelf, officers found items that belonged to Zepeda. In the same room they also found checks made out to Noe Vigil, and a driver's license belonging to Jesus Hernandez Sustaita. Avina's wallet contained a driver's license and a charge card that belonged to Morales.

Robert Nagles, a detective with the Riverside County Sheriff's Department, interviewed Avina and Gomez, both of whom waived their *Miranda*<sup>5</sup> rights and agreed to

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<sup>5</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

talk. Avina and Gomez told Detective Nagles they were committing crimes to support their drug use. In later interviews, one or both defendants admitted many of the charged offenses.

#### *D. Gomez's Uncharged Prior Crimes*

As evidence of intent, the prosecution presented evidence of two uncharged offenses that Gomez committed, one in 2003 and the other in 2006. Tonya Bronson, who was an Indio Police Department patrol officer in 2003, testified that on June 30 that year, at around 12:46 p.m., she responded to a report of a theft at Ruiz's Jewelers in Indio. Officer Bronson's investigation led her to Gomez, whom she interviewed after he waived his *Miranda* rights and agreed to speak with her. Gomez said he went into the jewelry store, looked at one bracelet, told the clerk he wanted to look at another, and then grabbed both bracelets out of her hand and ran out of the store. Gomez told Officer Bronson he sold the bracelets for \$200 and used the money to support his drug addiction.

Detective Brandi Swan of the Riverside County Sheriff's Department testified that on June 20, 2006, at around 9:22 a.m., she was dispatched to an address on Morgan Street in Coachella to investigate a theft.<sup>6</sup> There, Detective Swan spoke with Elsie Carmona. After speaking with Carmona, Detective Swan located Gomez hiding in an abandoned house in Indio. Detective Swan spoke with Gomez, who waived his *Miranda* rights and agreed to speak with her. Gomez told her he took a generator he knew belonged to

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<sup>6</sup> It appears from the record that tjos address in Coachella is the address of the house where Gomez lived with his mother, Elsie Gomez.



Carmona, he did not have her permission to take it, he sold it to an auto parts store in Coachella for \$75, and he used the money to buy heroin, food, soda, and cigarettes.

## DISCUSSION

### I

#### *GOMEZ'S APPEAL*

Gomez contends there is insufficient evidence to support his convictions of counts 8 (attempted robbery of Goetz), 17 (robbery of Sustaita), and 22 (robbery of Pimentel) because there is no evidence he was involved. We reject this contention.

##### *A. Applicable Legal Principles*

###### *1. Elements of robbery and attempted robbery*

Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

"An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694.)

"In determining whether a person has been guilty of attempted robbery, the courts are guided by the facts of each case as to when the defendant has gone further than mere preparation." (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 863.) "[A]n attempt to steal may be proved by inference from all of the circumstances of the case." (*Ibid.*)

Attempted robbery "requires neither the commission of an element of robbery nor the completion of a theft or assault." (*People v. Lindberg* (2008) 45 Cal.4th 1, 28.) Since

robbery requires proof of use of force or fear, "an attempted robbery *may* also include this element of the offense, but it is erroneous to say that the crime *must* have progressed this far in order to constitute an attempt." (*People v. Vizcarra, supra*, 110 Cal.App.3d at pp. 862-863.)

## 2. *Standard of review*

When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

The uncorroborated testimony of a single witness is sufficient to sustain a conviction or true finding on an enhancement allegation, "unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

## B. *Analysis*

### 1. *Count 8: Attempted robbery of Dean Goetz*

We reject Gomez's contention that his conviction of the robbery of Dean Goetz is not supported by sufficient evidence.

#### a. *Background*

Goetz testified that on May 27, at around 2:50 p.m., he was gardening in his front yard in Palm Springs when two men in a grayish American mid-sized car turned around at the cul-de-sac and stopped a few feet away from him. Goetz later told the police he got a look at the driver, whom he described as "stocky." The Hispanic passenger, whom Goetz identified at trial as Avina, got out of the car and rushed up to Goetz pointing a handgun at him, and said, "Give me your money. Give me your money. I'm going to shoot you if you don't give me your money."

When Goetz told Avina he had no money on him, Avina patted him down, and Goetz let him put his hands in Goetz's pockets because Avina had a gun. When Avina found nothing, he told Goetz, "Let's go into the garage." In the garage, Avina looked in Goetz's car and, finding nothing, asked Goetz, "Where's your wallet?" Goetz said it was in the house, and Avina said, "Let's go in the house." When Goetz told him there were people inside the house, Avina looked surprised, backed up frantically waving the gun, and said, "Don't call the police. I'll come back and kill you if you call the police. I know your address." Avina got back into the car through the passenger door, and the car drove away.

b. *Analysis*

Gomez claims his conviction of the attempted robbery of Goetz charged in count 8 must be reversed because the prosecution presented no substantial evidence that he participated in the commission of that crime. Specifically, he asserts that, although "it is clear" Avina attempted to rob Goetz, "[i]t cannot be inferred . . . that [Gomez] was the getaway driver." Gomez also asserts that, as the robbery of Erasmo Felix Machado (Machado) (count 21, discussed, *ante*) demonstrates, "it appeared at times that [Avina] was working with more than just [Gomez]." We conclude substantial evidence supports Gomez's conviction of count 8.

Goetz identified Avina at trial as the man who attempted to rob him at gunpoint, and the prosecution presented the testimony of then-Detective Troy Castillo who indicated Avina provided numerous details of the crime to the police.

Court's exhibit No. 19 is a photograph of the light green Ford Taurus Gomez was driving when Corporal Porras made the traffic stop and pulled him over. The prosecution established that this Ford Taurus was registered to Gomez's mother, Elsie Gomez, with whom Gomez lived. Gomez cites no substantial evidence, and our review of the trial record discloses none, showing that anyone other than Gomez drove his mother's car during the commission of the crimes involved in this case.

The prosecutor showed exhibit No. 19 to Goetz and asked him, "Does that resemble the car that you saw Mr. Avina and the other man in that day?" Goetz replied, "It looks like the similar size and color, yes." Goetz also indicated that in June 2006, at the request of the police, he went to Coachella to see if he could identify a car. Goetz

told the police the vehicle looked like the one used during the robbery. Substantial evidence thus supports a finding that the car used during the robbery of Goetz was the green Ford Taurus that belonged to Gomez's mother and which undisputed evidence shows Gomez drove during the commission of other robbery offenses involved in this case, such as count 1 (victim: Reyes) as to which Reyes testified the license plate on the Taurus had the name "Gomezz"<sup>7</sup> on it, and counts 11 and 12 (victims: Pedro Ortega and Jorge Ortega, respectively) as to which the Ortegas identified Gomez as the driver of the "greenish gray" Ford Taurus used during the commission of those crimes.

The prosecution presented additional circumstantial evidence that sufficiently identified Gomez as the driver of the Ford Taurus used during the robbery. Goetz testified he got a look at the driver, whom he described as stocky. This description is similar to the description that Reyes, the victim of the count 1 robbery, gave of Gomez, whom Reyes identified at trial as the driver of the Ford Taurus used in the commission of that crime. Specifically, Reyes described Gomez as a Hispanic who was more stout than his passenger (Avina).

In addition, as our summaries, *ante*, of the evidence admitted with respect to the various crimes involved in this case show, Gomez and Avina's modus operandi consisted of stopping the Ford Taurus near the intended victim, and the passenger (Avina) getting out of the car, pointing a handgun at the victim, demanding the victim's wallet,

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<sup>7</sup> The prosecution presented evidence that, on the top shelf of a closet in Gomez's room, officers found a California license plate that had the name "Gomezzz" (with three z's on it).

threatening the victim with harm, and then getting back into the Taurus through the passenger's side and driving away. Substantial evidence establishes that this same method was used during the robbery of Goetz. As discussed, *ante*, Gomez's Ford Taurus stopped near Goetz, Avina got out of the passenger's side of the car, rushed up to Goetz pointing a handgun at him, demanded money and threatened to shoot him, got back into the car through the passenger's side, and the car then drove away. This same pattern of conduct was described by Reyes as to count 1, Solomon as to count 9, the Ortegas as to counts 11 and 12, Castellon as to count 13, Sustaita as to count 17 (discussed, *post*), and Pimentel as to count 22 (also discussed, *post*).

Gomez contends the evidence is insufficient because, as the robbery of Machado (count 21) demonstrates, "it appeared at times that [Avina] was working with more than just [Gomez]." This contention is unavailing. Machado indicated at trial that when the two men who robbed him ran back to the small four-door car, they got into the right side, the passenger's side, of the car. Defense counsel asked Machado, "[I]t's your recollection that there was somebody else there that was driving the vehicle, or in the driver's seat?" Machado replied, "Yes." Here, however, Goetz's testimony establishes that the stocky driver, who substantial evidence shows was Gomez, remained in the Taurus, and only Avina got out and back in through the passenger's side of the car. As noted, there is no evidence that anyone other than Gomez drove his mother's Ford Taurus during the commission of the crimes involved in this case.

## *2. Count 17: Robbery of Sustaita*

Gomez also contends his conviction of the robbery of Sustaita as charged in count 17 must be reversed because it is not supported by sufficient evidence. We reject this contention.

### *a. Background*

Sustaita testified that on June 13, at around 6:00 a.m., he was putting his lunch box inside his truck, which was parked in front of his house in Coachella, when two men in a gray or blue Ford Taurus drove by slowly and stopped nearby. A Hispanic man, whom Sustaita identified at trial as Avina, got out of the passenger's side of the Taurus, pulled a handgun from his waistband, cocked it with a sliding motion, walked towards Sustaita, and told Sustaita not to look at him. Avina reached into Sustaita's pocket and took his wallet, which contained about \$220 in cash, credit cards, bank cards, and his driver's license and Social Security card. Avina demanded and took the keys to Sustaita's truck, got back into the Taurus, and threw Sustaita's keys out the window as the car drove away.

### *b. Analysis*

We conclude substantial evidence supports Gomez's conviction of count 17. As noted, court's exhibit No. 19 was a photograph of the light green Ford Taurus that was registered to Gomez's mother, Elsie Gomez, and that Gomez was driving when Corporal Porras made the traffic stop. Sustaita testified that the car shown in that photograph "look[ed] similar" to the Ford Taurus that the armed passenger, whom Sustaita identified at trial as Avina, exited. According to Sustaita, only two men were in the Ford Taurus. Again, Gomez cites no substantial evidence, and our review of the trial record discloses

none, showing that anyone other than Gomez drove his mother's car during the commission of the crimes involved in this case.

Court's exhibit No. 17 was a photograph of the .45-caliber semiautomatic handgun that Corporal Porras discovered underneath the passenger's seat of Gomez's Ford Taurus. Sustaita testified the gun shown in that photograph resembled the gun that Avina used during the robbery.

Detective Herman Lopez testified that a driver's license belonging to Sustaita was found in a bucket in Gomez's bedroom.

In addition, the method in committing the robbery of Sustaita was similar to Gomez and Avina's modus operandi. The Ford Taurus stopped near Sustaita, Avina got out of the passenger side of the car, cocked the semiautomatic handgun, took Sustaita's wallet, and got back into the Taurus, which drove away. We affirm Gomez's conviction of count 17.

### *3. Count 22: Robbery of Pimentel*

Last, Gomez contends his conviction of the robbery of Pimentel as charged in count 22 must be reversed because it is not supported by sufficient evidence. We reject this contention.

#### *a. Background*

Pimentel testified that on June 19, between 6:00 and 6:30 a.m., he was watering a tree outside his home in Mecca when two men in a green Ford Taurus drove by, turned around, came back, and stopped. A Hispanic man about six feet tall got out of the passenger side of the Taurus, pulled out a black semiautomatic handgun, and told



Pimentel, "Look that way. Put your hands up." The man took Pimentel's wallet, which contained about \$280 or \$290 in cash, his driver's license, a bank card, and a credit card. The man got back in the car and it drove away.

b. *Analysis*

We conclude substantial evidence supports Gomez's conviction of count 22.

Pimentel testified that the Ford Taurus used during the robbery was green. As noted, court's exhibit No. 19 was a photograph of the light green Ford Taurus that Gomez was driving when Corporal Porras pulled him over. The prosecutor showed the photograph to Pimentel and asked, "[D]oes that resemble the car that you saw that day?" Pimentel first answered, "No." The prosecutor then asked him, "What's different about that picture?" Giving an answer showing he actually agreed the Ford Taurus shown in the photograph resembled the Ford Taurus he saw during the robbery, Pimentel replied, "It was like greenish, and this is gray." The prosecutor then asked, "You see that as gray?" Pimentel answered, "Yes." The prosecutor asked, "And the car you saw was green; correct?" Pimentel responded, "It was *light green*." (Italics added.) Although Pimentel was having difficulty in the courtroom seeing that the Ford Taurus shown in court's exhibit No. 19 was light green, his testimony that the Ford Taurus he saw during the robbery was green matches Corporal Porras's testimony that the Ford Taurus Gomez was driving when she pulled him over was light green.

Gomez cites no evidence, and our review of the trial record discloses none, showing that more than two men were in the Ford Taurus during the robbery, or that

anyone other than Gomez drove his mother's car during the commission of the crimes involved in this case.

As noted, court's exhibit No. 17 was a photograph of the .45-caliber semiautomatic handgun Corporal Porras found underneath the passenger's seat of Gomez's Ford Taurus. Pimentel testified the gun shown in that photograph resembled the gun used by the Hispanic passenger during the robbery.

In addition, the method used during the robbery of Pimentel was similar to Gomez and Avina's modus operandi. The Ford Taurus stopped near Pimentel, a Hispanic male got out of the passenger's side of the car, pulled out the semiautomatic handgun, took Pimentel's wallet, and got back into the Taurus, which drove away. We affirm Gomez's conviction of count 22.

## II

### *AVINA'S APPEAL*

#### *A. Sufficiency of the Evidence (Count 22: Attempted Robbery of Pimentel)*

Avina first contends his conviction of the robbery of Pimentel as charged in count 22 must be reversed because it is not supported by sufficient evidence. We reject this contention.

We have already discussed the evidence presented as to count 22, and we have determined both that the method used during the robbery of Pimentel was similar to Gomez and Avina's modus operandi, and that Pimentel's testimony that the Ford Taurus he saw was light green matches Corporal Porras's testimony that the Ford Taurus Gomez was driving when she pulled him over was light green.

As noted, Pimentel also testified the gun shown in court's exhibit No. 17—a photograph of the .45-caliber semiautomatic handgun Corporal Porras found underneath the passenger's seat of Gomez's Ford Taurus—resembled the gun that the Hispanic passenger used to commit the robbery. Under Gomez and Avina's modus operandi, Avina was the passenger in Gomez's Ford Taurus and was armed with a .45-caliber semiautomatic handgun.

In addition, the record shows Avina is five feet 10 inches tall. Pimentel testified that the armed Hispanic man who got out of the passenger's side of the light green Ford Taurus was about six feet tall.

We conclude the foregoing substantial evidence supports Avina's count 22 robbery conviction. Accordingly, we affirm his conviction.

*B. Section 654 (Count 24: Grand Theft)*

Avina next contends the execution of the sentence imposed for his count 24 grand theft conviction should have been stayed under section 654 because both his count 23 robbery conviction and his count 24 grand theft conviction arose from an indivisible course of conduct with a single objective. The Attorney General agrees the execution of the sentence imposed for Avina's count 24 grand theft convictions should have been stayed under section 654. We conclude the judgment against Avina must be modified because the court should have stayed the execution of that sentence under section 654.

*1. Background*

Count 23 charged Avina with robbing Ana Ramirez at Prizma Jewelers, and count 24 charged him with committing grand theft at that store during the same incident.

Stella Flores, who worked at Prizma Jewelers in Coachella, testified on behalf of the prosecution that on April 26, at around 12:44 p.m., a man, whom she identified at trial as Avina, entered the store and told salesperson Brenda Leon that he wanted to buy a gift for his girlfriend. After choosing a \$2,500 set of gold bracelets with a discounted price of \$1,940, Avina said he was going to pay with a credit card. When Flores started to prepare a receipt and asked for his driver's license, Avina reached over the counter, grabbed the box containing the bracelets, said "Thank you very much," and walked out of the store. Ramirez, a salesperson inside the store, grabbed the back of Avina's shirt and told him to return the bracelets. Avina swung his right arm at Ramirez, pushed her, and ran away.

The jury convicted Avina of counts 23 and 24. The court imposed a one-year prison term for Avina's count 23 conviction, and a consecutive eight-month term for his count 24 conviction.

## *2. Section 654*

Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 "precludes multiple punishment for a single act or omission, or an indivisible course of conduct" (*People v. Deloza* (1998) 18 Cal.4th 585, 591) and ensures the defendant's punishment will be commensurate with his or her criminal culpability (*People v. Kramer* (2002) 29 Cal.4th 720, 723). If a defendant suffers two convictions

and punishment for one is barred by section 654, that section requires that the sentence for one conviction be imposed and the other be imposed and then stayed. (*People v. Deloza*, supra, 18 Cal.4th at pp. 591-592.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant, not the temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the criminal acts were incident to one objective, then punishment may be imposed only as to one of the offenses committed. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

### 3. Analysis

The evidence presented at trial (discussed, *ante*) shows Avina's count 23 and count 24 convictions both arose out of one indivisible course of conduct incident to one objective: the unlawful taking of the bracelets at the Prizma Jewelers store. Accordingly, the court should have stayed execution of the eight-month sentence it imposed for Avina's count 24 conviction. (§ 654, subd. (a); *People v. Rodriguez*, supra, 47 Cal.4th at p. 507; *People v. Deloza*, supra, 18 Cal.4th at pp. 591-592.)

### C. Section 654 (Count 30: Grand Theft)

Avina also contends the execution of the sentence imposed for his count 30 grand theft conviction should have been stayed under section 654 because his count 29 burglary conviction and his count 30 grand theft conviction were based upon the same act of taking a gold chain from Don Roberto's Jewelers. The Attorney General agrees the execution of the sentence imposed for Avina's count 30 grand theft conviction should have been stayed under section 654. We conclude the judgment against Avina again

must be modified because the court should have stayed the execution of that sentence under section 654.

1. *Background*

Count 29 charged Avina with committing a second-degree burglary at Don Roberto's Jewelers, and count 30 charged him with committing grand theft there during the same incident.

Jomayra Pinon, who worked as a salesperson at Don Roberto's Jewelers in Coachella, testified on behalf of the prosecution that on April 23, between 11:30 a.m. and 12:15 p.m., a Hispanic man, whom she identified at trial as Avina, entered the store, approached her, and said he wanted to buy a gift for his father. Avina looked at some chains and necklaces, spoke to Pinon about opening a line of credit, and left.

Avina returned to the store later that day, between 1:00 and 2:00 p.m., and asked Pinon if he could see some more chains. Avina said his name was Raul Garza, and, when Pinon asked him for identification, he said he probably was going to pay cash. Avina chose a gold chain worth about \$2,400 or \$2,500. As Pinon was holding the box containing the chain, leaning back to get authorization from her supervisor, Avina pulled the box out of Pinon's hand and walked out the door. Avina entered a truck through the passenger side, and the truck drove away.

The jury convicted Avina of counts 29 and 30. The court imposed an eight-month prison term for Avina's count 29 conviction, and a consecutive eight-month term for his count 30 conviction.

## 2. *Analysis*

The trial evidence shows Avina's count 29 and count 30 convictions both arose out of one indivisible course of conduct incident to one objective: the unlawful taking of the gold chain from the Don Roberto's Jewelers store. Accordingly, the court should have stayed execution of the eight-month sentence it imposed for Avina's count 30 conviction. (§ 654, subd. (a); *People v. Rodriguez, supra*, 47 Cal.4th at p. 507; *People v. Deloza, supra*, 18 Cal.4th at pp. 591-592.)

### D. *Section 654 (Count 27: Unlawful Possession of a Firearm by a Felon)*

Last, Avina contends the execution of the sentence imposed for his count 27 conviction of unlawful possession of a firearm by a felon should have been stayed under section 654. We reject this contention.

## 1. *Background*

Avina stipulated at trial that he previously had been convicted of a felony. As noted, Corporal Porras testified that on June 20, after she made the traffic stop of Gomez's Ford Taurus in Coachella, and after Gomez—who was the only person inside the car—was arrested, she searched the car and found the .45-caliber semiautomatic handgun—which was inoperable in that it could not fire a bullet—underneath the front passenger's seat. Corporal Porras discovered the handgun the day after Avina and Gomez robbed Pimentel on June 19.

The jury convicted Avina of being a felon in possession of a firearm (§ 12021, subd. (a)(1), hereafter § 12021(a)(1)) as charged in count 27 of the amended information, which alleged that Avina willfully and unlawfully had the handgun in his possession "on

or about" May 19 and June 20. The court sentenced him to an eight-month prison term for this conviction.

## 2. *Analysis*

Avina asserts that execution of the sentence imposed for his count 27 conviction should have been stayed under section 654 because "[t]he crime of unlawful possession of a firearm by a felon in count 27, during the period from May 19, 2006 to June 20, 2006, and the armed robberies committed during that same time frame, were part of an indivisible course of conduct with a single objective." He also asserts his "possession of the same inoperable gun used in each robbery was for the sole purpose of committing the robberies and not to inflict physical injury upon any of the alleged victims or to commit other crimes." Thus, he claims, because the handgun was inoperable and he used it only to commit the robberies, he "did not harbor two criminal intents and objectives."

We conclude the court properly imposed the eight-month prison term for Avina's count 27 conviction. The purpose of the law codified in section 12021(a)(1) making it a crime for convicted felons to possess firearms "is to protect public welfare by precluding the possession of guns by those who are more likely to use them for improper purposes." (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037.) "Due to the potential for death or great bodily injury from the improper use of firearms, public policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them." (*Ibid.*)

Here, Avina's misuse of the semiautomatic handgun during his commission of the series of robberies and attempted robberies at issue in this case is manifest. His intent to



unlawfully possess the handgun despite his stipulated prior felony conviction, in violation of section 12021(a)(1), was a criminal intent separate from, and independent of, his criminal intent to permanently deprive his victims of their personal property against their will by means of force or fear (§ 211). The police discovered the handgun on June 20, hidden under the front passenger's seat of the Ford Taurus that Avina and Gomez used to commit their crimes, one day *after* Avina and Gomez committed their last robbery (of Pimentel). Substantial evidence shows Avina had possession of the handgun even though he was not present with Gomez inside the Taurus when Corporal Porras made the traffic stop on June 20. Overwhelming evidence establishes that, in committing their crimes, Gomez acted as the driver of the Taurus and Avina was the passenger armed with the handgun who would physically assault their victims and take or attempt to take their wallets. When discovered by the police, the handgun was hidden under Avina's seat, readily accessible to him the next time he and Gomez decided to rob another victim. Avina's possession of the handgun posed a threat to public welfare, the precise risk the enactment of section 12021(a)(1) was intended to prevent. (See *People v. Pepper, supra*, 41 Cal.App.4th at p. 1037.)

The fact that the handgun could not fire a bullet is of no moment. The gun was operable in the sense that Avina could manually and audibly operate the chambering mechanism by using a sliding motion in a convincing manner calculated to instill fear in his victims for the purpose of coercing them to give him their wallets.

Our decision to affirm the punishment imposed for Avina's count 27 conviction furthers the purpose of section 654 of ensuring the defendant's punishment will be

commensurate with his or her criminal culpability. (See *People v. Kramer*, *supra*, 29 Cal.4th at p. 723.) Avina's criminal conduct involved illegal post-robbery possession of the handgun in addition to his commission of a series of robberies using that weapon. Section 654 does not prohibit punishing him for both types of criminal conduct because his involvement in these distinct criminal acts made his conduct more culpable. (*People v. Kramer*, at p. 723.)

We need not address Avina's attempt to distinguish *People v. Atencio* (2010) 190 Cal.App.4th 695 because the California Supreme Court granted review in that case (Mar. 16, 2011, S189461). (See Cal. Rules of Court, rules 8.1105(e)(1) & 8.1115(a).) We affirm the sentence imposed for Avina's count 27 conviction.

#### DISPOSITION

The judgment against Avina is modified to stay under Penal Code section 654 the execution of the sentences the court imposed for his count 24 grand theft and count 30 grand theft convictions. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect these modifications of the judgment, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment against Gomez is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.